Abou Sylla v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05(M)-168–05 OF 2016 AND W-05(LB)-180–05 OF 2016
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
30 AUGUST 2017

Criminal Procedure — Trial — Miscarriage of justice — Trial judge convicted accused on drug trafficking charge without explicitly ruling whether conviction based on direct trafficking under s 2 of the Dangerous Drugs Act 1952 or presumed trafficking under s 37(da) — Whether trial judge's omission put accused in dilemma as to evidential burden he had to discharge, ie, whether it was higher burden of rebutting s 37(da) presumption on balance of probabilities or lower burden of merely raising reasonable doubt in case of direct trafficking — Whether trial judge committed serious misdirection in law which occasioned miscarriage of justice that entitled accused to acquittal — Whether trial court's acquittal of accused on second charge of drug trafficking correct as prosecution wholly failed to cross-examine him on his evidence with respect to that charge — Whether accused's unchallenged defence to second charge raised reasonable doubt in prosecution's case

When the appellant Abou Sylla ('the accused') went to the Kuala Lumpur Hospital early one morning complaining of stomach pain and nausea, little did he anticipate that he would end up being detained at the hospital's critical-zone ward for one week and then be charged for trafficking in dangerous drugs. The accused was detained at the ward after an x-ray revealed that he had 30 small packages inside his stomach. During the week that followed, he excreted 78 capsules containing a total of 768.6g of methamphetamine. On the same day the accused was admitted, a police officer found in a pocket of the accused's trousers a key to a hotel room where he was staying. Using the key, the officer and a police team searched the room and recovered another 23 capsules containing 228.6g of methamphetamine. The High Court convicted and sentenced the accused to death on a charge of trafficking in the methamphetamine that was recovered from him at the hospital ('the second charge') but acquitted him on a charge of trafficking in the drugs that were found in the hotel room ('the first charge'). Both trafficking charges were under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The accused's instant appeal was against the conviction and sentence while the prosecution appealed against the acquittal. The accused claimed he had no knowledge of the drugs and thought the capsules contained gold dust. The accused said while he was in China, a person named Matthew gave him the capsules and he was paid USD2,000 to swallow them and bring them to Malaysia to be delivered to a person named Jackson. The accused said Jackson came to the hotel room and

gave him fruits to eat to excrete the capsules. He managed to excrete a few capsules but since the others were stuck in his stomach, Jackson sent him to the hospital. The High Court ruled that the accused's defence to the second charge was a mere denial and failed to raise a reasonable doubt on the prosecution's case. With regard to the first charge, the trial court held that as the prosecution did not cross-examine the accused on his defence to the drugs found in the hotel room, he had raised a reasonable doubt on the prosecution's case. In the instant appeal, the accused raised a sole point of law — that he had been seriously prejudiced by the trial judge's failure to rule whether his conviction was based on a finding of actual trafficking (and, if so, what specific act of trafficking had been committed under s 2 of the DDA) or of presumed trafficking (and, if that was the case, why no ruling was made as to whether the presumption had been rebutted or not). The accused contended that the trial judge's failure was fatal and entitled him to an acquittal or, alternatively, a conviction of mere possession under s 12(2) of the DDA because of the uncertainty raised over the evidential burden he had to discharge at the end of the trial — whether it was the higher burden of rebutting a presumption of trafficking under s 37(da) of the DDA on a balance of probabilities or the lower burden of merely raising a reasonable doubt in the prosecution's case if the conviction was based on a finding of direct trafficking.

Held, substituting the conviction and death sentence on the second charge with conviction under s 12(2) of the DDA and sentence of 25 years' jail and ten strokes of whipping and affirming the accused's acquittal on the first charge:

(1) The trial court's judgment made no mention whether the accused was convicted of an act of actual trafficking under s 2 of the DDA or of presumed trafficking under s 37(da). The failure to state whether it was a case of direct or presumed trafficking was a serious misdirection in law which had occasioned a miscarriage of justice to the accused (see paras 25–26 & 29).

(2) This was not a fit and proper case for the court to invoke the proviso under s 60(1) of the Courts of Judicature Act 1964 as submitted by the prosecution. The court below committed misdirection in both law and fact. Nevertheless, there was overwhelming evidence against the accused. The proven facts led to only one reasonable conclusion: that the accused was indeed engaged in the trafficking of dangerous drugs. He was not entitled to an outright acquittal. The material fact that the impugned drugs were found inside his body was not disputed (see para 35).

(3) The trial judge accepted the accused's evidence in respect of the recovery of the drugs from the hotel room. As rightly found by the trial judge, not a single question from the prosecution's cross-examination challenged the accused's evidence and explanation. In his evidence, the accused said that he had swallowed all the capsules given by Matthew while he was in

China and the same was excreted by him at the hotel room and at the hospital. The accused also said that Jackson came to his hotel room and took all the capsules that were excreted after the accused consumed fruits that Jackson had brought. A few inferences could be drawn as to how the 23 capsules were recovered from the hotel room. It was trite that the inference most favourable to the accused should be adopted. The 23 capsules found in the hotel room could have been brought by Jackson or excreted by the accused and kept in the room by Jackson without the accused's knowledge (see para 45).

(4) There were many gaps and infirmities in the prosecution's case in respect of the first charge and many unsatisfactory fixtures in the investigation and in the alleged recovery of the 23 capsules from the hotel room. The hotel staff was not called to testify regarding spare keys and the possibility of access by others to the room. There was DNA profiling of three other persons from the inner-ware recovered from the room which was unexplained. The prosecution's appeal against the accused's acquittal on the first charge had no merit and no appealable error was committed by the trial judge that warranted appellate intervention (see paras 46–47).

[Bahasa Malaysia summary

Apabila perayu Abou Sylla ('tertuduh') pergi ke Hospital Kuala Lumpur seawal satu pagi mengadu sakit perut dan loya, tidak menjangka yang dia akan ditahan di wad zon kritikal untuk tempoh selama satu minggu dan kemudiannya dituduh mengedar dadah berbahaya. Tertuduh ditahan di wad selepas x-ray menunjukkan yang dia mempunyai 30 paket kecil di dalam perutnya. Semasa minggu berikutnya, dia mengumuhkan 78 kapsul mengandungi methamphetamine seberat 768.6g. Pada hari yang sama perayu dimasukkan ke dalam hospital, pegawai polis menemui di dalam poket seluar tertuduh kunci bilik hotel di mana dia tinggal. Menggunakan kunci tersebut, pegawai polis dan sepasukan polis menggeledah bilik tersebut dan menemui 23 lagi kasul yang mengandungi methamphetamine seberat 228.6g. Mahkamah Tinggi mensabitkan dan menjatuhkan hukuman mati terhadap tertuduh atas tuduhan mengedar methamphetamine yang ditemui daripadanya di hospital ('tuduhan kedua') tetapi membebaskannya atas tuduhan mengedar dadah yang dijumpai di bilik hotel ('tuduhan kedua'). Kedua-dua tuduhan mengedar adalah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Rayuan tertuduh ini adalah terhadap sabitan dan hukuman sementara pihak pendakwaan merayu terhadap pembebasan. Tertuduh mendakwa dia tidak mempunyai pengetahuan mengenai dadah tersebut dan fikir kapsul-kapsul tersebut mengandungi serbuk emas. Tertuduh menyatakan bahawa semasa dia di China, seorang yang bernama Matthew memberikannya kapsul-kapsul tersebut dan dia dibayar sebanyak USD2,000 untuk menelan dan membawanya ke Malaysia untuk dihantar kepada seorang yang bernama Jackson. Tertuduh dan Jackson datang ke bilik hotel dan memberinya buah

untuk mengumuhkan kapsul-kapsul tersebut. Dia dapat mengumuhkan beberapa kapsul tetapi memandangkan yang lain terlekat di dalam perutnya, Jackson menghantar dia ke hospital. Mahkamah Tinggi memutuskan bahawa pembelaan tertuduh kepada tuduhan kedua hanya penafian semata-mata dan gagal untuk membangkitkan keraguan munasabah ke atas kes pihak pendakwaan. Berkenaan tuduhan pertama, mahkamah perbicaraan memutuskan bahawa memandangkan pihak pendakwaan tidak memeriksa balas tertuduh atas pembelaannya kepada dadah yang dijumpai di dalam bilik hotel tersebut, dia telah membangkitkan keraguan munasabah ke atas kes pihak pendakwaan. Dalam rayuan ini, tertuduh membangkitkan satu-satunya poin undang-undang — bahawa dia telah diprejudis secara serius oleh kegagalan hakim perbicaraan untuk memutuskan sama ada sabitannya adalah didasarkan atas dapatan pengedaran sebenar (dan, jika ia, apa tindakan spesifik pengedaran telah dilakukan di bawah s 2 ADB) atau anggapan pengedaran (dan, jika ia adalah kes, mengapa tiada keputusan dibuat terhadap sama ada anggapan telah dipatahkan atau tidak). Tertuduh berhujah bahawa kegagalan hakim perbicaraan adalah serius dan memberi hak kepadanya kepada pembebasan atau secara alternatif, sabitan dengan milikan semata-mata di bawah s 12(2) ADB kerana ketidaktentuan yang dibangkitkan ke atas beban keterangan yang perlu dia dilepaskan di akhir perbicaraan — sama ada ia adalah beban yang lebih tinggi mematahkan anggapan pengedaran di bawah ADB atas imbangan kebarangkalian atau beban yang lebih rendah dengan hanya membangkitkan keraguan munasabah dalam kes pihak pendakwaan jika sabitan adalah diasaskan ke atas dapatan pengedaran langsung.

Diputuskan, menggantikan sabitan dan hukuman mati ke atas tuduhan kedua dengan sabitan di bawah s 12(2) ADB dan hukuman penjara 25 tahun dan sepuluh sebatan rotan dan mengesahkan pembebasan tertuduh ke atas tuduhan pertama:

(1) Penghakiman mahkamah perbicaraan tidak menyebut sama ada tertuduh disabitkan terhadap tindakan pengedaran sebenar di bawah s 2 ADB atau anggapan pengedaran di bawah s 37(da). Kegagalan untuk menyatakan sama ada ia adalah kes pengedaran langsung atau anggapan adalah salah arah serius dari segi undang-undang yang menyebabkan ketidakadilan kepada tertuduh (lihat perenggan 25–26 & 29).

(2) Kes ini bukan kes wajar dan betul untuk mahkamah membangkitkan peruntukan di bawah s 60(1) Akta Mahkamah Kehakiman 1964 seperti yang dihujahkan oleh pihak pendakwaan. Mahkamah bawahan melakukan salah arah dari segi undang-undang dan fakta. Walau bagaimanapun, terhadap keterangan yang kukuh terhadap tertuduh. Fakta yang dibuktikan membawa kepada hanya satu kesimpulan yang munasabah: bahawa tertuduh sememangnya menjalankan pengedaran dadah berbahaya. Dia tidak berhak kepada pembebasan secara terang-terangan. Fakta material bahawa dadah yang dipersoalkan

tersebut ditemui di dalam badannya tidak dipertikaikan (lihat perenggan 35).

(3) Hakim perbicaraan menerima keterangan tertuduh berkaitan penemuan dadah daripada bilik hotel tersebut. Seperti yang didapati secara betul oleh hakim perbicaraan, tidak terdapat satu soalan daripada pemeriksaan balas pihak pendakwaan mencabar keterangan dan penjelasan tertuduh. Dalam keterangannya, tertuduh menyatakan bahawa dia telah menelan kesemua kapsul yang diberikan oleh Matthew semasa dia di China dan yang sama telah dikumuhkan olehnya di bilik hotel dan di hospital. Tertuduh juga menyatakan bahawa Jackson datang ke bilik hotelnya dan mengambil kesemua kapsul-kapsul yang telah dikumuhkannya selepas tertuduh memakan bauh-buahan yang dibawa oleh Jackson. Beberapa inferens boleh dibuat terhadap bagaiamana 23 kapsul ditemui daripada bilik hotel tersebut. Ia adalah nyata bahawa inferens yang sepatutnya terhadap tertuduh diguna pakai. 23 kapsul yang didapati di dalam bilik hotel mungkin dibawa oleh Jackson atau dikumuhkan oleh tertuduh dan disimpan di bilik oleh Jackson tanpa pengetahuan tertuduh (lihat perenggan 45).

(4) Terdapat banyak jurang dan kelemahan dalam kes pihak pendakwaan berkaitan tuduhan pertama dan banyak lekapan yang tidak memuaskan di dalam penyiasatan dan penemuan yang didakwa terhadap 23 kapsul di dalam bilik hotel. Pekerja hotel tidak dipanggil untuk memberi keterangan tentang kunci pendua dan kemungkinan akses oleh orang lain kepada bilik tersebut. Terdapat profil DNA tiga orang lain daripada pakaian dalam ditemui daripada bilik tersebut yang tidak dijelaskan. Rayuan pihak pendakwaan terhadap pembebasan tertuduh atas tuduhan pertama tidak mempunyai merit dan bukan kesilapan boleh dirayukan untuk dilakukan oleh hakim perbicaraan yang mewajarkan campur tangan mahkamah rayuan (lihat perenggan 46–47).]

Notes

For cases on miscarriage of justice, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6030–6037.

Cases referred to

Chiu Nang Hong v PP [1965] 1 MLJ 40, PC (refd)

Daniel Akachukwu Agbanusi v PP [2017] 2 MLJ 243; [2017] 4 CLJ 200, CA (distd)

PP v Ishak bin Hj Shaari & Other Appeals [2003] 4 MLJ 585; [2003] 3 CLJ 843 (refd)

PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)

Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya [2016] 4 MLJ 22; [2016] 1 LNS 303, PC (refd)

Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408; [2014] 4 CLJ 406, CA (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)
Tang Kheng Teong v PP [2003] 3 MLJ 108; [2003] 2 CLJ 701, CA (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)
Wong Yew Ming v PP [1991] 1 MLJ 31, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Criminal Procedure Code s 422
Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), (da), 39A(2), 39B(1)(a), (2), First Schedule
Evidence Act 1950 s 15
Federal Constitution arts 5, 8

Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Adam bin Mohamed (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

[1] This is a cross-appeal. The accused, a Republique De Guinee national, was charged with two offences of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same.

[2] Particulars of the charges were as follows:

> First Charge (Case No: 45A-37-06/2014)
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> Bahawa kamu pada 8.1.2014 jam lebih kurang 5.30 petang di bilik 01, Hotel Liintel Inn, No. 210 Jalan Tun HS Lee, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur telah didapati mengedar dadah berbahaya jenis methamphetamine berat bersih 228.6 gram. Oleh itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.
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> Second Charge (Case No: 45A-36-06/2014)
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> Bahawa kemu pada 8.1.2014 jam lebih kurang 9.05 pagi sehingga 11.1.2014 jam lebih kurang 11.15 pagi di Wan Zon Kritikal, Hospital Kuala Lumpur, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur telah didapati mengedar dadah berbahaya methamphetamine berat bersih 768.6 gram. Oleh itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[3] At the end of the trial, the learned High Court judge ('the trial judge') convicted the accused and sentenced him to suffer the mandatory death

penalty of the second charge and acquitted him of the first charge. Aggrieved by the conviction and sentence, the accused appealed to this court. The public prosecutor aggrieved by the acquittal of the accused of the first charge, likewise appealed to this court. Both appeals were heard together.

[4] We heard both the appeals on 24 July 2017. After hearing the parties and after perusing the appeal records, we allowed the accused's appeal in part. We set aside the conviction under s 39B(1)(a) of the Act and substituted it with a conviction under s 12(2) and punishable under s 39A(2) of the Act. After hearing parties on the sentence, we imposed a sentence of 25 years imprisonment and ten strokes of whipping on the accused.

[5] We dismissed the appeal by the public prosecutor against the accused's acquittal of the first charge. We affirmed the order of an acquittal of the accused of the first charged.

[6] We now give our grounds of our decision.

THE PROSECUTION'S CASE

[7] The prosecution's case may be summarised as follows. On 8 January 2014 at about 5am, the accused came to Kuala Lumpur General Hospital and met Dr Kamadev a/l Sonamuthu ('PW3'). The accused complained that he had stomach ache and feel like vomiting.

[8] An x-ray was immediately done and the image showed that there were about 30 small packages inside the accused's stomach. The accused was thus detained in the critical zone ward of the hospital and a police report was lodged.

[9] The accused was detained at the said ward from 8 January 2014 until 15 January 2014. During that period of detention, the accused excreted a total of 78 capsules suspected to contained dangerous drugs.

[10] The 78 capsules were sent to the chemist, Dr Vanitha Kunalan ('PW5') who confirmed that the 78 capsules contained methamphetamine with a total weight of 768.6g, subject matter of the second charge. PW5 also confirmed that methamphetamine is listed under the First Schedule of the Act.

[11] On 8 January 2014, while the accused was still under detention in the ward, ASP Mohd Farid bin Mokhtar ('PW12') had recovered a hotel key from the accused's trousers pocket. The accused informed PW12 that the key was the key to his room at No 1, Hotel Liintel Inn, along Jalan Tun HS Lee. PW12 and his team went to the said room and recovered 23 capsules suspected to contained dangerous drugs.

[12] The 23 capsules were sent to PW5 for analysis and confirmed to contained methamphetamine with a total weight of 228.6g, subject matter for the first charge.

[13] At the close of the prosecution's case, the learned trial judge acquitted and discharged the accused on both the charges, holding that the prosecution had failed to establish a prima facie case on both the charges.

[14] A subsequent appeal by the prosecution to the Court of Appeal was allowed and the accused was ordered to enter upon his defence on both the charges.

THE DEFENCE

[15] The accused elected to give evidence under oath. He denied having any knowledge of the drugs. He admitted swallowing and excreting the capsules he believed to contained gold dust. He swallowed the capsules while he was in Quanzang, China. The capsules were given to him by one Matthew in Quanzang. The accused said that he was paid USD2,000 by John to swallow the capsules containing the gold dust and to bring them into Malaysia. He alleged that some of the capsules were introduced into his body by Matthew through his anus.

[16] The accused also stated that he was supposed to deliver the capsules to a person named Jackson at the hotel he stayed ie Hotel Liintel Inn, Jalan Tun HS Lee Jackson and a few other persons did come to his hotel room the next day. Jackson gave him fruits to eat in order to excrete the capsules. He excreted a few capsules which were taken by Jackson but some of the capsules were stuck in his stomach. Thus, he was sent by Jackson to the hospital.

[17] The accused denied knowing that the capsules contained dangerous drugs otherwise he would not have swallowed the capsules. The accused testified that he did not inform the police about Matthew and Jackson as the police did not asked him.

[18] Having evaluated the evidence of the accused, the learned trial judge found that the accused had failed to raise a reasonable doubt on the prosecution's case in respect of the second charge (drugs excreted by the accused). His Lordship held that the accused's defence in respect of the second charge were *mere denial*. Learned trial judge also blamed the accused for his failure to disclose the existence of John, Matthew and Jackson to the police during the investigation. His Lordship opined that the prosecution had proved its case beyond a reasonable doubt in respect of the second charge. The accused was thus convicted and sentenced to death on the second charge.

[19] In respect of the first charge for the drugs recovered from the hotel room, His Lordship held that the accused had succeeded in raising a reasonable doubt on the prosecution's case. The prosecution had failed to cross-examined the accused in respect of the drugs found in the hotel room. Thus, the accused was acquitted and discharged of the second charge.

[20] We shall now deal with the accused's appeal.

THE GROUNDS OF APPEAL BY THE ACCUSED

[21] Before us, learned counsel for the accused canvassed only one main ground of appeal, namely, that the accused had been prejudiced in that he does not know the basis of his conviction, whether it was a case of direct trafficking or presumed trafficking. This issue was raised as a point of law.

[22] Learned counsel's complaint was that there was no indication in the judgment of the learned trial judge whether the accused was convicted based on actual trafficking or presumed trafficking. Learned counsel argued that the omission on the part of the learned trial judge to state whether it was a case of direct trafficking or presumed trafficking was erroneous and fatal. Learned counsel asked for an outright acquittal or in the alternative, a conviction of possession simpliciter under s 12(2) punishable under s 39A(2) of the Act.

[23] Learned counsel relied on three cases decided by this court, namely *Daniel Akachukwu Agbanusi v Public Prosecutor* [2017] 2 MLJ 243; [2017] 4 CLJ 200; *Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya* [2016] 4 MLJ 22; [2016] 1 LNS 303; and *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406.

[24] In reply, the learned deputy public prosecutor ('the learned deputy') submitted the case of *Tang Kheng Teong v Public Prosecutor* [2003] 3 MLJ 108; [2003] 2 CLJ 701 and urged upon us to invoke the provisio under s 60(1) of the Courts of Judicature Act 1964 ('Act 91') to find the accused guilty of trafficking. Learned deputy further cited the case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381, which decided that based on strong and overwhelming evidence such as in the present case where the drugs were found in the accused's abdomen, the conviction should be maintained despite a misdirection by the trial judge.

OUR DECISION

[25] We have perused through the judgment of the learned trial judge and we agree that there is no indication in the judgment whether the accused was

convicted based on actual trafficking or presumed trafficking. There was no mention at all by the learned trial judge whether the accused had committed an act of actual trafficking under s 2 or presumed trafficking under s 37(da) of the Act in convicting the accused for an offence of trafficking in the impugned drugs under s 39B(1)(a) of the Act. In fact, the learned trial judge did not consider trafficking in the impugned drugs as one of the element of the charge against the accused person as can be seen from His Lordship's judgment at p 21 AR Vol 1:

> E. Intipati-Intipati Pertuduhan
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> 1. Sama ada barang yang disyaki itu dadah berbahaya?
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> 2. Sama ada Tertuduh ada jagaan, kawalan, milikan dan ada pengetahuan mengenai dadah berbahaya tersebut?
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> 3. Sama ada rantaian keterangan pendakwaan teratur?

[26] We are of the view that there was a misdirection by the learned trial judge for his failure to state whether the conviction of the accused was based on actual or presumed trafficking. The issue before us now is whether the failure of the learned trial judge had occasioned a failure of justice and fair trial and if that is so, whether it can be cured under s 422 of the Criminal Procedure Code. Under normal circumstances, a misdirection in law occured where the appellant is able to demonstrate that there has been a miscarriage of justice or there has been withheld from him a rule of law operating in his favour, the appellate court will normally interfere by setting aside the conviction (see: *Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40).

[27] The learned deputy urged upon us to invoke the proviso under s 60(1) of Act 91, and to affirm the conviction on the strength of the prosecution's case against the accused. The proviso to s 60(1) of Act 91 reads a follows:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[28] The learned deputy further argued that no substantial miscarriage of justice had occured in the present appeal before us on the ground that the learned trial judge had infact considered all the evidence before him and had applied the correct burden before convicting the accused of the trafficking charge. In this regard, His Lordship stated in his grounds of judgment, at pp 23–24 AR Vol 1, as follows:

> Selepas meneliti pembelaannya, Mahkamah berpendapat pembelaan Tertuduh langsung tak menimbulkan sebarang keraguan yang munasabah ke atas kes pendakwaan ... Mahkamah berpuashati pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah ke atas Tertuduh ...

[29] We agreed with learned counsel. We are of the considered view that the failure of the learned trial judge to state whether it was direct or presumed trafficking was a serious misdirection in law. To our mind the misdirection in law had occasioned a miscarriage of justice to the accused person.

[30] What amount to a miscarriage of justice or a failure of justice had been addressed by Gopal Sri Ram JCA (as he then was) in *Tunde Apatira & Ors*, where His Lordship had with approval cited three authorities decided in other jurisdiction, as follows:

> The way in which the proviso is to be applied has been considered in several cases. Three of these deserve mention.
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> In *Marz v The Queen* [1955] 93 CLR 493 at p 514, Fullagar J, when addressing a similar provision in the New South Wales Criminal Appeal Act 1912 said:
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> > It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedures and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.
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> In *Krishna Murthy v Abdul Subban* [1965] 1 Cr LJ 565 at p 576, Hegde J when dealing with the Indian equipollent of s 422 of our Criminal Procedure Code said:
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> > The expression 'a failure of justice has in fact occasioned thereby' found in s 535(1) Cr PC does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For the purpose the Legislature need not have introduced the conception of 'failure of justice' in ss 535 and 537, Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrificed of the one, in the generality of cases, is bound to lead to the sacrifice of other. The two are closely interlinked.
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> In *Ratten v R* [1974] 131 CLR 510 at p 516, however, Barwick CJ, explained the way in which the proviso is to be applied to particular circumstances. He said:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.
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> So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 exemplifies the general rule, while that in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151 illustrates the exception.

[31] In *Public Prosecutor v Ishak bin Hj Shaari & Other Appeals* [2003] 4 MLJ 585; [2003] 3 CLJ 843, the court further explained the meaning and extent of the application of the term 'failure of justice' in s 422 of the CPC when an accused was denied a fair trial as follows:

> In our view, having regard to the aforesaid object of the CPC, the issue whether or not the misdirection has occasioned a failure of justice can be resolved by seeking answer to certain corollary questions, namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself? If the answers are in the affirmative, the only conclusion is that there has been no prejudice and failure of justice. If the answers are in the negative, the trial must necessarily be treated as vitiated. If there exists a reasonable doubt regarding the answers, the benefit of doubt must be given to the accused.

[32] In *Tang Kheng Teong*, cited to us by the learned deputy, the so call misdirection by learned trial judge as argued by the appellant was for the failure to make a finding of fact as to who was the actual trafficker, whether the appellant or a person by the name of Choong. It was held that the argument was bereft of any merit. In the present case before us, learned counsel's complaint relates to uncertainty on the part of the accused as to the evidential burden to be discharge by him at the end of the trial. If the learned trial judge had invoked the presumption under s 37(da) for the element of trafficking, the accused bears a higher burden to rebut the presumption on a balance of probabilities as decided in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC). If it is on direct trafficking, than the burden is only to raise a reasonable doubt.

A But, in the present case, the learned trial judge had used a lower burden of raising a reasonable doubt in holding that the prosecution's case had been proved beyond reasonable doubt.

B **[33]** Another aspect of the learned trial judge's judgment which had been criticised by the appellant was the uncertainty as to what act under s 2 had been committed by the accused for the trafficking charge assuming that the learned trial judge had applied s 2 of the Act to prove trafficking. If the learned trial judge had invoked presumed trafficking because of the weight of the drugs involved, then the learned trial judge had, however, failed to make a finding C whether the presumption had been rebutted or not.

[34] Learned counsel for the appellant had raised arts 5 and 8 of the Federal Constitution in objecting the use of the proviso under s 60(1) of Act 91 and D urged upon us to follow this court earlier decision in *Daniel Akachukwu Agbanusi v Public Prosecutor* [2017] 2 MLJ 243; [2017] 4 CLJ 200, which is on all fours with the present appeal before us where it was decided:

> (39) The principles enunciated in the above cases are equally applicable to this case where the trial judge did not make known whether the appellant's case was premised E on actual trafficking under s 2 of the Act or presumed trafficking under s 37(da) of the same Act. And whether the appellant had rebutted the presumption.
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> (40) In conclusion, the appellant may consider himself fortunate for the lapses of the trial judge in writing his ground of judgment. Based on the evidence before the court, we were of the view that his conviction was not safe. We therefore minded to F reduce the charge to a lesser offence of possession of drugs under s 12(2) of the Act, punishable under s 39A(2) of the same Act.

[35] We are of the view that this is not a fit and proper case for us to invoke G the proviso. The court below committed misdirections in both law and fact. But, nevertheles, in our view, there was overwhelming evidence against the appellant in regard to the commission of the offence charged. The proven facts lead to only one reasonable conclusion that the appellant was indeed engage in the trafficking in dangerous drugs. He is not entitled to an outright acquittal. H The material fact that the impugned drugs were found inside the appellant's body was not disputed.

[36] Based on the foregoings, we allowed the accused/appellant's appeal in part. We set aside the conviction and death sentence imposed by the High I Court, and substituted it with a conviction under s 12(2) punishable under s 39A(2) of the Act. After hearing the parties on sentence, we imposed an imprisonment term of 25 years commencing from the date of arrest and ten strokes of whipping on the accused/appellant.

THE PROSECUTION'S APPEAL

[37] We shall now deal with the prosecution's appeal against the acquittal of the accused of the first charge in respect of the impugned drugs found in the hotel room.

[38] The learned deputy raised only one main central issue, namely, that the learned trial judge had failed to consider the evidence in totality before deciding that the prosecution had failed to proved its case beyond a reasonable doubt at the end of the trial. Learned deputy argued that there are strong facts to proved custody and control of Room 01, Hotel Liintel Inn against the accused. The undisputed facts were such as:

(a) the key to the room was recovered from the accused trousers' pocket;

(b) 23 capsules of drugs were found in the said room;

(c) some personal belongings of the accused were also recovered from the same room which includes International Passport, boarding pass, flight tickets and hotel receipt, all under the accused name;

(d) the hotel room was registered under the accused's name;

(e) the type of drugs recovered were similar with the drugs excreted by the accused in the HBKL ward; and

(f) clothings bearing the accused DNA were also recovered in the said room.

[39] Learned deputy relied on *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149 where it was held that the accused had custody and control of the impugned drugs recovered in the room. For the element of knowledge, learned deputy argued that the trial judge should have invoked the presumption under s 37(d) and direct trafficking under s 2 of the Act for keeping the drugs in the room.

[40] On the issue of similar type of drugs, the learned deputy argued that the drugs recovered from the room were similar in type and appearance with the drugs excreted by the accused. All were in capsules. The learned deputy argued that the accused had knowledge of the drugs and relied on the Supreme Court's decision in *Wong Yew Ming v Public Prosecutor* [1991] 1 MLJ 31 to show evidence of system which is relevant and admissible under s 15 of the Evidence Act 1950.

A OUR DECISION

[41] In acquitting the accused of the first charge, the learned trial judge reasoned as follows at p 24 AR Vol 1:

B > Untuk pertuduhan pertama, pendakwaan langsung tak menyoal balas Tertuduh. Kegagalan berbuat demikian adalah satu penerimaan seperti yang diputuskan oleh kes *Tan Kim Lue v Public Prosecutor* [1971] 1 MLJ 174. Oleh itu, pembelaan berjaya menimbulkan keraguan yang munasabah ke atas kes pendakwaan untuk pertuduhan pertama ...
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C > Untuk pertuduhan pertama, pembelaan berjaya menimbulkan keraguan yang munasabah. ...
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> Untuk pertuduhan pertama, Tertuduh dilepas dan dibebaskan.

D **[42]** After perusing the appeal records, we unanimously agree with the decision of the learned trial judge. The learned trial judge had accepted the evidence of the accused in respect of the recovery of the drugs in the hotel room. As rightly pointed by the learned trial judge, not a single question from the prosecution's cross-examination challenging the accused evidence and explanation. We find no error on the part of the learned trial judge in his finding.
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[43] The material part of the accused evidence-in-chief in respect of the drugs found in the hotel room were as follows:

F (a) the capsules were given to him by Matthew in Guangzang, China and he was asked to swallowed them believing they contains gold dust;

(b) he was supposed to deliver the capsules to Jackson when he arrived in Malaysia;

G (c) some of the capsules he had excreted at the hotel room were taken by Jackson;

(d) later, he had excreted all the capsules at the hospital;

(e) the police took his hotel room key from his trousers pocket;

H (f) the police did not take him to the hotel room and he did not know about the drugs allegedly recovered by the police from the hotel room; and

(g) the police did not tell him anything about the recovery of the drugs from the hotel room.

I **[44]** The testimonies of the accused was not challenged by the prosecution. The learned trial judge was right in relying on the decision of Sharma J in *Tan Kim Lue*, in accepting the accused's unchallenged evidence and in acquitting the accused of the first charge. At p 175 of that case, Sharma J opined:

> Another sad aspect of this case is that the learned magistrate having once decided to call upon the defence and the defence having given an explanation which could very reasonably be true still convicted him. One of the defence witnesses deposed that the six jacks were bought from the shop of Hock Tong Hin by the appellant and brought by him in the witness's car. This witness was never cross-examined by the prosecution at all. In spite of this the learned magistrate has convicted the appellant. This, I think, was entirely wrong. When the prosecution chooses not to cross-examine a witness the natural inference is that it accepts the evidence of that witness in its totality.

[45] There was no challenged by the prosecution that the 23 capsules allegedly recovered by SP12 from the hotel room on 8 January 2014 were kept by the accused or were there with the full knowledge of the accused. In his evidence, the accused said that he had swallowed all the capsules given by Matthew while he was in China and the same had been excreted by him at the hotel room and at the hospital. His further evidence was that Jackson did came to his hotel room and took all the capsules he had excreted at the hotel room after consuming fruits brought by Jackson. A few inferences can be drawn as to how the 23 capsules were recovered from the hotel room. It is trite that the one most favorable to the accused should be adopted by the trial judge. The capsules could be brought by Jackson or excreted by the accused and kept in the room by Jackson without the accused's knowledge.

[46] We are of the considered opinion that there were many gaps in the prosecution's case in respect of the first charge. There were many unsatisfactory fixtures in the investigation and in the alleged recovery of the 23 capsules in the hotel room. We would also say that there were many infirmities in the prosecution's case. The hotel staff was not call to testify regarding spare keys and possibility of access by others to the room. There were DNA profiling of three other persons from the inner-ware recovered from the room which were unexplained.

[47] In the upshot, we find no merits in the appeal by the prosecution against the acquittal of the accused on the first charge. There is no appealable error committed by the learned trial judge warranting an appellate intervention. We, therefore, unanimously affirmed the acquittal of the accused on the first charge by the High Court.

CONCLUSION

[48] We unanimously allowed the accused's appeal in part in respect of the second charge. We set aside the conviction and the death penalty imposed by the High Court. We substituted it with a conviction under s 12(2) punishable under s 39A(2) of the Act. We imposed 25 years imprisonment and ten strokes of whipping in lieu thereof.

A **[49]** We unanimously dismissed the prosecution appeal in respect of the first charge. The acquittal of the accused of the first charge by the High Court is affirmed.

Order accordingly.

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Reported by Ashok Kumar

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